No. 91-7050

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

KEVIN G. TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Interstate Agreement on Detainers required dismissal of the indictment against petitioner, when petitioner, a state prisoner with a federal detainer lodged against him, chose to return to state custody after being brought to federal court for arraignment.

2. Whether petitioner received effective assistance of counsel.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-4) is reported at 947 F.2d 1002.

JURISDICTION

The judgment of the court of appeals was filed on October 28, 1991. A petition for rehearing was denied on November 21, 1991. The petition for certiorari was filed on January 21, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted on three

counts of bank robbery, in violation of 18 U.S.C. 2113(a). He was sentenced to 84 months' imprisonment, to be followed by three years' supervised release. The court of appeals affirmed. Pet. App. 1-4.

1. On June 8, 1989, petitioner attempted to rob the Cambridge Trust Company, a federally insured financial institution in Cambridge, Massachusetts. When the teller delayed in responding to petitioner's demand for money, petitioner fled without obtaining any money. Later that day, petitioner robbed the First American Bank, a federally insured institution in Boston, and escaped with $2,360. On June 22, 1989, petitioner entered the Boston Five Cents Savings Bank, another federally insured bank, and passed a note to the teller demanding money. Petitioner again fled without obtaining any money when the teller delayed in responding to the note. Gov't C.A. Br. 7-10.

2. Based on a different incident, petitioner was arrested on state bank robbery charges and incarcerated at the state correctional institution at Concord, Massachusetts. On June 29, 1989, a federal arrest warrant was issued charging petitioner with unarmed bank robbery. On July 18, 1989, the United States Marshals Service served a detainer on petitioner at the Concord facility without informing the United States Attorney. Pet. App. 2; Gov't C.A. Br. 1. Petitioner refused to sign the acknowledgement that he had received notice of the detainer. C.A. App. A31. On September 23, 1989, petitioner was sentenced on the state bank robbery charges to a four-to-five-year term of

imprisonment. Gov't C.A. Br. 1.

On October 4, 1989, a federal grand jury indicted petitioner on three counts of unarmed bank robbery. On November 7, 1989, a writ of habeas corpus ad prosequendum was issued to bring petitioner before a federal magistrate for arraignment. At the arraignment, the magistrate asked the Assistant United States Attorney whether any detainer had been filed against him. The prosecutor responded, "There's no detainer pending or anything." The magistrate further asked, "No demand on the interstate detainer act?," and the prosecutor replied, "No, your honor." C.A. App. A36-A37. The United States Attorney's office had no notice or knowledge of the detainer that had been filed by the Marshals Service almost four months before.

The magistrate then advised petitioner that he could remain in federal custody, in which case he would receive no credit on his state sentence, or he could elect to return to state custody to continue serving his state sentence. Petitioner elected to return to state custody. At the same time, the magistrate informed petitioner that a detainer would be filed against him and explained that the filing of the detainer meant that when petitioner was released from state custody, he would be brought back before the magistrate for a bail hearing. C.A. App. A36-A39. In response, petitioner asked the magistrate an unrelated question about the relationship between his two prosecutions. Although petitioner knew of the detainer, he never mentioned that it had been filed against him. Pet. App. 2. After the

arraignment, petitioner was returned to state custody. Ibid.

While petitioner was serving his state sentence, he was brought to trial on the federal indictment. On the first day of trial, petitioner moved to dismiss the indictment, asserting that the events of November 7, 1989, violated the Interstate Agreement on Detainers (IAD). At that point, the prosecutor, petitioner's counsel, and the court learned for the first time that a detainer had been filed against petitioner in July 1989. C.A. App. A59-A63. The district court denied the motion to dismiss. Id. at A65, 69.

3. The court of appeals affirmed. Pet. App. 1-4. The court concluded that it was a technical violation of the IAD for petitioner to have been returned to state custody after a detainer had been filed and he had been brought to federal court on a writ of habeas corpus ad prosequendum. Relying on circuit precedent, however, the court held that the brief interruption in state custody did not threaten petitioner's rehabilitation, especially since petitioner had been promptly returned to the same state institution. Thus, the underlying purposes of the IAD were not implicated, and there was no reason to dismiss the indictment. Id. at 3. The court also rejected petitioner's claim that he received ineffective assistance of counsel. Id. at 4.

ARGUMENT

1. Petitioner renews his contention (Pet. 9-18) that the IAD was violated on November 7, 1989, when he was returned to

state custody without being tried in federal court, and that he is therefore entitled to dismissal of the indictment. That contention is without merit.

Article IV of the Interstate Agreement on Detainers, 18 U.S.C. App. § 2, Article IV, sets forth a procedure by which a State (including the federal government, see United States v. Mauro, 436 U.S. 340, 353-356 (1978)) that has lodged a detainer against a person who is incarcerated in another State can secure the prisoner's presence for disposition of outstanding charges. Once a detainer is filed with the "sending State," a prosecutor can have the prisoner made available by presenting to the officials of the sending State "a written request for temporary custody or availability." Article IV(a). A writ of habeas corpus ad prosequendum constitutes such a request. United States v. Mauro, 436 U.S. at 361-365. When a State has secured the presence of a prisoner through this process, the receiving State must try the prisoner on the charges supporting the request before returning the prisoner to the sending State. Article IV(e). If a trial is not held, the IAD provides that the indictment will be dismissed with prejudice. Ibid.

Although petitioner is correct that the federal government did not try petitioner before returning him to state custody on November 7, 1989, he is not entitled to have the federal indictment against him dismissed. First, at his November 7, 1989, arraignment, petitioner was given a choice between remaining in federal custody and being tried before being

returned to state custody, and returning to state prison to complete his sentence before being tried on the federal charges. Petitioner chose to return immediately to state custody. In light of that free choice, petitioner cannot now invoke the protections of the IAD.[1] It is well established that "since [the] purpose [of Article IV(e)] is to benefit the prisoner, the prisoner may waive its protection." United States v. Oldaker, 823 F.2d 778, 780 (4th Cir. 1987); see also United States v. Boggs, 612 F.2d 991, 993 (5th Cir.), cert. denied, 449 U.S. 857 (1980); Gray v. Benson, 608 F.2d 825, 827 (10th Cir. 1979); United States v. Ford, 550 F.2d 732, 742 (2d Cir. 1977), aff'd on other grounds sub nom. United States v. Mauro, 436 U.S. 340 (1978); United States v. Scallion, 548 F.2d 1168, 1174 (5th Cir. 1977), cert. denied, 436 U.S. 943 (1978).

In addition, petitioner's brief absence from state custody implicated none of the purposes of the IAD and does not justify dismissal of the indictment. Article IV(e) of the IAD -- the so-called "anti-shuttling" provision -- is intended to avoid the disruptive effect that repetitive transfers between jurisdictions might have on the rehabilitation of prisoners and to prevent prisoners from being penalized by the pendency of unresolved detainers. See United States v. Currier, 836 F.2d 11, 15 (1st Cir. 1987); United States v. Roy, 830 F.2d 628, 636 (7th Cir. 1987), cert. denied, 484 U.S. 1068 (1988). In this case,

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[1] We note that petitioner was the only participant in the federal arraignment proceeding who knew that a federal detainer had been lodged against him.

petitioner was brought to federal court for arraignment and returned to state custody in the same state prison on the same day. That absence could hardly have interfered with petitioner's rehabilitation or caused state officials to penalize him. Indeed, although petitioner asserts (Pet. 13) that he "may have" suffered adverse consequences because of his absence from state custody, he makes no specific claim of prejudice. Under similar circumstances, a number of courts have declined to require dismissal of an indictment. See, e.g., United States v. Roy, 830 F.2d at 636-637; United States v. Roy, 771 F.2d 54, 59-60 (2d Cir. 1985), cert. denied, 475 U.S. 1110 (1986); Sassoon v. Stynchombe, 654 F.2d 371, 374-375 (5th Cir. 1981); Huff v. United States, 599 F.2d 860, 863 (8th Cir.), cert. denied, 444 U.S. 952 (1979); United States v. Chico, 558 F.2d 1047, 1049 (2d Cir. 1977), cert. denied, 436 U.S. 947 (1978).

Petitioner claims (Pet. 14-16) that the decision here conflicts with the decisions in United States v. Thompson, 562 F.2d 232 (3d Cir. 1977) (en banc), cert. denied, 436 U.S. 949 (1978), and United States v. Schrum, 638 F.2d 214 (10th Cir. 1981), aff'g 504 F. Supp. 23 (D. Kan. 1980). Petitioner is correct that in those cases the Third and Tenth Circuits held that even technical violations of the IAD require dismissal of the indictment. Even if that issue -- which arises infrequently and affects few cases -- might otherwise merit this Court's view, this case does not present an appropriate vehicle for its resolution. As we have argued, petitioner elected to be returned

to state custody after his federal arraignment; he therefore waived the protections of the IAD. Moreover, with respect to cases like the present one, in which the receiving State is the federal government, Congress has provided that the sanction of mandatory dismissal with prejudice for violations of Article IV(e) is inappropriate. In Section 9(1) of the IAD, Congress provided that in such cases

> any order of a court dismissing any indictment * * * may be with or without prejudice. In determining whether to dismiss the case with or without prejudice, the court shall consider * * * the following factors: The seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of the agreement on detainers and on the administration of justice * * *.

If petitioner were to prevail, it would be inappropriate for any court to dismiss the indictment with prejudice in light of the de minimis violation of the IAD that occurred here and the lack of prejudice to petitioner.

2. Petitioner also contends (Pet. 18-20) that he received ineffective assistance of counsel because his trial counsel failed to discover that petitioner had a meritorious claim under the IAD. To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was objectively unreasonable and that counsel's errors prejudiced the defendant. Strickland v. Washington, 466 U.S. 668 (1984). Petitioner cannot meet either prong of that test.

First, petitioner's counsel did not raise petitioner's claim under the IAD because he was unaware that a detainer had been

lodged against petitioner in July 1989. In light of the fact that neither the United States Attorney nor the court knew of the detainer, petitioner's counsel cannot be faulted for failing to discover its existence. Counsel's failure to raise the IAD issue prior to trial was therefore not unreasonable.[2]

Second, petitioner cannot establish that he was prejudiced by counsel's failure to raise his claim under the IAD. Petitioner himself raised that claim prior to trial, and the court considered the claim on the merits and rejected it. The court of appeals affirmed the district court's decision. We fail to see what difference it could have made that petitioner raised the claim rather than counsel.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1992

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[2] Petitioner argues (Pet. 19-20) that his counsel's failure to press the IAD claim once he became aware of it also constituted ineffective assistance. To the contrary, counsel's tactical decision not to press an argument that was foreclosed by squarely applicable, indistinguishable circuit precedent, see United States v. Taylor, 861 F.2d 316 (1st Cir. 1988), does not constitute ineffective assistance.

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by mail on May 13, 1992.

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Kenneth W. Starr
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May 13, 1992